

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re ARDEN VAN UPP,

No. C 11-00178 SI

Debtor,

**ORDER RE: DECISIONS OF
BANKRUPTCY COURT**

ARDEN VAN UPP,

Appellant,

v.

WENDEL, ROSEN, BLACK & DEAN, LLP,
and DAVID A. BRADLOW, TRUSTEE,

Appellees.

Debtor Arden Van Upp appeals two orders of the United States Bankruptcy Court. Pursuant to Bankruptcy Local Rule 8012-1, the Court finds this matter appropriate for resolution without oral argument. After consideration of the record and the papers submitted by the parties, the Court AFFIRMS the order awarding fees to trustee's counsel, AFFIRMS IN PART and REVERSES IN PART the order awarding fees to trustee, and requires trustee to disgorge fees in the amount of \$225.

BACKGROUND

Debtor filed a voluntary petition for Chapter 11 bankruptcy on July 10, 2009. *See* Petition (Bankr. Case No. 09-31932, Doc. 1). At the time debtor filed for bankruptcy, her estate included three real properties located in San Francisco: one located at 2550 Webster Street ("Webster Street Property"), one located at 2807-2809 Steiner Street ("Steiner Street Property"), and one located at 1019

1 Ashbury Street (“Ashbury Street Property”). *See* Schedule A - Real Property (Bankr. Doc. 48). In
2 August 2009, several secured creditors objected to debtor’s marketing plan for the Webster Street
3 Property, calling her proposed listing price “unrealistic given the rundown condition of the . . .
4 property.” *See* Secured Creditors’ Joint Marketing Plan for 2550 Webster Street (Bankr. Doc. 68), at
5 3. These secured creditors requested the appointment of a trustee to take over the sale effort. *Id.* at 4.
6 The Bankruptcy Court entered an order directing the appointment of a chapter 11 trustee, and later
7 approved the appointment of David A. Bradlow as trustee of debtor’s bankruptcy estate. *See* Order
8 (Bankr. Doc. 82); Order (Bankr. Doc. 88).¹

9 The Bankruptcy Court made the following findings of fact regarding debtor’s conduct between
10 trustee’s appointment and January 2010:

11 [A]fter the court appointed a chapter 11 trustee, Debtor interfered with the efforts of that
12 Trustee to sell the Webster Street property, and to collect rents from the Ashbury Street
13 and Steiner Street properties. Declarations filed by Trustee and his counsel indicate that
14 Debtor: (1) refused to turn over legible or complete rent rolls to the Trustee; (2) refused
15 to turn over keys to the Steiner Street gate and front door, forcing the Trustee to engage
16 a locksmith replace the locks; (3) deposited rents into her daughter’s checking account,
17 returned those rents to Trustee only upon threat of a turnover motion, and never provided
18 an accounting of the rents in question; (4) ordered workman who were trying to repair
19 Webster Street’s severely dilapidated roof and back wall to leave the premises; (5)
20 authorized a man (Petrizze) to live on the Webster property without a lease and defended
21 him at eviction proceedings after having told the Trustee that Petrizze had no authority to
22 live on the property; (6) failed to collect half of the scheduled \$36,000 in rents for
23 September and October 2009[fn]; AND (7) after the Trustee’s appointment, directed a
24 tenant to pay rent to Debtor via an alias. When Trustee filed a motion to approve
25 procedures for the sale of the Webster Street property, Debtor brought a motion to dismiss
26 the chapter 11 case, which the court denied. . . . [fn] In addition to these acts, after
27 Trustee’s appointment and without any authorization by Trustee or this court, Debtor
28 withdrew \$40,000 cash from estate bank accounts.

See Memo Re: Secured Creditor Fees (Bankr. Doc. 238), at 4–5 & n.1.

In 2010 and 2011, debtor filed six appeals and original proceedings in the district court,

¹ As the Bankruptcy Court later explained:
[The Court] ordered the appointment of a chapter 11 trustee on the basis of Debtor’s gross mismanagement of her financial affairs. The most important instances of mismanagement consisted of: (1) allowing the Webster Street property to fall into an extreme state of disrepair; and (2) discharging her attorney when he filed a motion to effect the sale of the Webster Street property, where Debtor did not have sufficient income to service the debt on that property, where the court had advised Debtor that relief from stay would be granted if Debtor did not attempt to sell that property promptly, and where the Debtor had equity in that property that would be lost if relief from stay was granted and the Webster Street property was lost in foreclosure.

Memo re: Debtor’s Mot. to Dismiss Trustee (Bankr. Doc. 414), at 2.

1 including a civil complaint against trustee for financial elder abuse, breach of fiduciary duty, and
 2 negligence. With the exception of this appeal, all were dismissed by this Court for failure to prosecute,
 3 for lack of adequate cause, or for lack of jurisdiction.² Another individual, Samuel Sloan, filed a motion
 4 in the Bankruptcy Court to remove trustee, a motion for withdrawal of reference, and four appeals of
 5 multiple orders of the Bankruptcy Court that were each dismissed for lack of standing.³

6 Sloan describes himself in Bankruptcy Court filings as a “close personal friend of Arden Van
 7 Upp” who resided at the Webster Street property from 1991 until sometime after debtor filed for
 8 bankruptcy. *See Motion* (Doc. 177), ¶ 3. Sloan states that trustee initiated eviction proceedings against
 9 him in the San Francisco County Superior Court. *Id.* ¶ 2. Debtor confirms this story. *See Memo.* in
 10 Oppo. (Bankr. Doc. 278). The Bankruptcy Court described Sloan as “an officious . . . meddler, to say
 11 the least,” declared him to be a vexatious litigant on debtor’s motion, and imposed a filing injunction
 12 against him in the bankruptcy case. Feb. 2010 Transcript 4:14–4:15, 5:25–6:1 (Appellees’ Appendix
 13 78–79); Tentative Ruling (Bankr. Doc. 293); Order (Bankr. Doc. 302). The Bankruptcy Court also
 14 found that Sloan “at all relevant times had very close connections with the debtor.” December 2010
 15 Transcript 8:6–8:7 (Appellees’ Appendix 409).⁴

16 Around the same time that debtor filed her motion to declare Sloan a vexatious litigant, trustee
 17 requested permission to use estate assets to file a complaint against Sloan for defamation. Although the

2 See Cases No. 10-01431 SI, 10-01699 SI, 10-02616 (appeals of bankruptcy case filed by
 3 debtor, dismissed for failure to prosecute); Case No. 10-01934 SI (motion to withdraw reference filed
 4 by debtor, denied for lack of adequate cause); Case No. 10-2559 SI (civil complaint filed by debtor
 5 against trustee, dismissed for lack of jurisdiction).

6 See Motion (Bankr. Doc. 278); Case No. 10-01149 SI (motion for withdrawal of
 7 reference filed by Samuel Sloan, opened in error as a district court case); Cases No. 10-00204 SI, 10-
 8 00396 SI, 10-00577 SI, 10-00578 SI (appeals of bankruptcy case filed by Samuel Sloan, dismissed for
 9 lack of standing).

10 Trustee argues that debtor admitted to the Bankruptcy Court that it was she who signed the
 11 notices of these appeals, citing the transcript of a June 2010 hearing (Appellees’ Appendix 188 ln 21).
 12 However, it appears from the context of debtor’s admission that she was acknowledging having signed
 13 her own name on her own notices of appeal, discussed *supra* footnote 2, in response to an inquiry as
 14 to whether or not her signature had been forged. *See id.* at lns 22–24.

15 Trustee argues that debtor “provided her valuable assistance” to Sloan by “delivering
 16 each of Sloan’s motions to the Bankruptcy Court for filing.” Appellees’ Br. at 5 & n. 19 (citing Mot.
 17 to Withdraw Reference (Bankr. Doc. 366), ¶ 11). Trustee’s argument is based on an uncorroborated
 18 statement by Sloan himself contained in one of Sloan’s filings, not on an admission by debtor or a
 19 finding of fact by the Bankruptcy Court.

1 Bankruptcy Court issued a tentative ruling against trustee before the hearing on his motion, *see*
2 Tentative Ruling (Bankr. Doc. 293), ultimately the Bankruptcy Court gave him permission to file a
3 complaint for declaratory and injunctive relief in an adversary proceeding in the Bankruptcy Court using
4 estate assets, *see* Feb. 2010 Transcript 61:17–61:21 (Appellees' Appendix 135) ("I'm inclined to allow
5 you a reasonable amount of fees to try to get this . . . carefully-tailored relief."); Order (Bankr. Doc. 425)
6 (Appellees' Appendix Tab 15) (granting trustee's application for compensation and reimbursement);
7 Order (Bankr. Doc. 426) (Appellees' Appendix Tab 16) (granting counsel for trustee's application for
8 compensation and reimbursement); *see also* Adversary Proceeding No. 10-03040.

9 Over the course of the bankruptcy proceedings, debtor has repeatedly attempted to have her case
10 dismissed.⁵ At one point, the Bankruptcy Court issued a conditional dismissal, upon debtor's former
11 counsel's "representation that all disputes would be resolved by withdrawal of notices of appeal" and
12 that "debtor wished to . . . stop the litigation and provide for the payment of all claims, including
13 administrative claims." *See* December 2010 Transcript 3:18–4:4 (Appellees' Appendix 404–05). At
14 a December 2010 hearing, however, the Bankruptcy Court found that the conditional dismissal was "not
15 really relevant anymore, because the conditions that attach to it are unlikely ever to be fulfilled," given
16 that debtor dismissed the attorney who had made those representations, and that she made "a 180-degree
17 change in the course of conduct that he indicated the debtor would follow." *Id.* TR 4:5–4:10 (Appellees'
18 Appendix 405).

19 The December 2010 hearing concerned the second fee applications filed by trustee and trustee's
20 counsel, which debtor opposed. Debtor argued that the expenses incurred were unnecessary and
21 excessive given that the estate was "basically in a conditional dismissal situation," *id.* TR 3:11
22 (Appellees' Appendix 404), and in particular she challenged the money that trustee and trustee's counsel

23
24 ⁵ She has also moved for the dismissal of trustee. In a July 2010 Order denying debtor's
June 2010 motion, the Bankruptcy Court explained that
25 not all creditors have been paid. Debtor has filed appeals that Trustee must defend.
Debtor has filed a lawsuit that Trustee must defend. Trustee may be entitled to be
26 reimbursed by the estate for fees and costs incurred in those disputes. This court is not
[confident] that Debtor can be trusted to preserve and manage the funds of the estate
27 pending the outcome of those disputes. Based on Debtor's conduct in this case, this court
is not confident that Debtor would obey orders that this court might enter directing her to
use such funds to pay fees of Trustee and his professionals.
28 Memo. Re: Debtor's Mot. to Dismiss Trustee (Bankr. Doc. 414), at 2.

1 spent litigating appeals, litigating debtor's civil complaint against trustee, and litigating against Sloan.
2 Debtor argued that such litigation was not necessary for the administration of the estate or otherwise
3 beneficial to debtor.

4 After having explained that the conditional dismissal order was no longer relevant, the
5 Bankruptcy Court rejected these arguments:

6 [W]e are in the kind of case where there is a lot of litigation, where orders that have been
7 entered by the Court are subject to appeal. Where – in which the trustee is defending
orders entered at the request of the trustee and that have been on motions that have been
granted by this Court.

8 And it is just axiomatic that the estate funds may be used to defend orders entered
in motions made by the trustee that have been granted by the Court.

9 Now there's a lot of money being spent in this case, it's true. And it's money that
10 could otherwise go to the debtor, that's true. But the money is being – all that money is
being spent. The fees are [being] incurred, because the debtor is unduly contesting things,
is contesting matter, after matter, after matter.

11 Now the debtor can do that, but the debtor can't – has no right to have the trustee
not defend orders that have been entered by the Court. The trustee is really – the debtor is
really spending her own money.

13 *Id.* TR 4:11-5:3 (Appellees' Appendix 405–06).

14 The Bankruptcy Court also made findings of fact at the hearing regarding the activities for which
15 trustee and trustee's counsel sought reimbursement:

16 [W]ith respect to each of those activities I find that it was very much appropriate for the
trustee to hire counsel to assist the trustee in the activities in question, responding to the
appeals, keeping current with the operating reports, defending the litigation brought
against the trustee, obtaining judgment for libel perpetrated against the trustee in
circumstances which strongly indicate that the party committing the libel was – at all
relevant times had very close connections with the debtor, responding to an objection to
a fee application – if I haven't mentioned it earlier, defending the appeals of orders entered
by this Court, responding to a motion to withdraw reference.

20 In certain limited categories within that, there are objections as to the amount of
21 the fees sought. That has to do with the fee application. It has to do with the Sloan
litigation and the motions to dismiss in the – in the litigation brought against the trustee
by debtor.

22 And in those instances where the reasonableness of amount of fees incurred was
brought at issue, not just the – whether the conduct itself was necessary, the services were
necessary, I find in each instance that the fees are reasonable, given the nature [of] the
controversy and are supported by the declarations.

24 Regarding the fee application, the amount sought [in] the fee application would be
unreasonably large were there not an objection and/or had the debtor – had the trustee not
prevailed in the objection. But given the fact that there was an objection and that the
trustee prevailed, the amounts are reasonable.

26 The amounts sought in the litigation brought against the trustee in the District
Court are not unreasonable due to the nature of the controversy and are supported by the
time sheets.

28 The same with respect to the Bradlow versus Sloan matter. The trustee heeded the
Court's admonition to – to seek a determination, not a large damage award, to seek limited

1 scope of relief.

2 The trustee was initially seeking to hold much more money than was expended
3 here. And given all of the circumstances I think the amount sought was reasonable and
4 was again supported by the time sheets.

5 But I'm going to overrule this objection and allow[] the fees as requested, you
6 know, again – but once again, that the – the trustee as – the trustee has not created this
7 situation. The debtor has. Everything I've seen in this case so far indicates that the trustee
8 has acted efficiently and in every respect properly.

9 And I see no reason why the – why the trustee and the trustee's counsel should
10 suffer a financial loss in addition to the – to the abuse that's being piled on them. The fees
11 are – are allowed, and you may submit orders.

12 *Id.* TR 7:24–9:24 (Appellees' Appendix 408–10).

13 The Bankruptcy Court entered orders granting the second fee applications of trustee and trustee's
14 counsel, awarding trustee \$24,705.00 in fees and \$25.15 in costs, and awarding trustee's counsel
15 \$127,775.50 in fees and \$3,553.74 in costs. *See Order* (Bankr. Doc. 425) (Appellees' Appendix Tab
16 15) (granting trustee's application for compensation and reimbursement for the period March 1, 2010
17 through November 26, 2010); *Order* (Bankr. Doc. 426) (Appellees' Appendix Tab 16) (granting counsel
18 for trustee's application for compensation and reimbursement for the period March 12, 2010 through
19 October 31, 2010). The two orders are the subject of this appeal.

16 **LEGAL STANDARD**

17 A bankruptcy court's conclusions of law, including its interpretation of the Bankruptcy Code,
18 are reviewed de novo. *In re S. Cal. Sunbelt Developers, Inc.*, 608 F.3d 456, 461 (9th Cir. 2010). A
19 bankruptcy court's findings of fact are reviewed for clear error. *Higgins v. Vortex Fishing Systems, Inc.*,
20 379 F.3d 701, 705 (9th Cir. 2004). A factual finding is clearly erroneous if, after reviewing the record,
21 the appellate court has a definite conviction an error has been made. *In re Beauchamp*, 236 B.R. 727,
22 729-730 (9th Cir. BAP 1999). Where "the historical facts are established; the rule of law is undisputed
23 . . . ; and the issue is whether the facts satisfy the legal rule," a mixed question of fact and law is
24 presented and is reviewed de novo. *See In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997).

25 A fees award will be upheld unless the bankruptcy court abused its discretion or erroneously
26 applied the law. *S. Cal. Sunbelt Developers*, 608 F.3d at 461; *see also In re Strand*, 375 F.3d 854, 856
27 (9th Cir. 2004).

DISCUSSION**I. Order granting the second fee application of trustee's counsel****A. Preparation of the first fee application**

Debtor quotes the local bankruptcy guidelines for the proposition that fees for preparation of a fee application may not exceed five percent of the total amount of fees and costs requested in the application. See Guideline 6, U.S. Bankr. Ct. for the N. Dist. of Cal., Guidelines for Compensation and Expense Reimbursement of Professional and Trustees (“Guidelines”), available at <http://www.canb.uscourts.gov/procedures/dist/guidelines/guidelines-compensation-and-expense-reimbursement-professional-and-trustee>. Debtor argues that the award sought and granted by trustee's counsel for “Employment and Compensation of Professionals” exceeds this five percent cap. She also argues that the award is unreasonable, and that trustee's counsel is not entitled to the award because it is for work that did not benefit the estate or aid in its administration.

Trustee's counsel requested and received \$27,771.00 for what they called “Employment and Compensation of Professionals,” which they documented in Exhibit A to their second fee application. See Bankr. Doc. 418 (Appellees' Appendix Tab 10), Ex. A. It is clear from Exhibit A of trustee's counsel's second fee application, which lists the tasks that were part of the challenged category, that a certain portion of the \$27,771.00 award was intended to compensate trustee's counsel for time spent advising *trustee* about *trustee's* first fee application, which debtor had challenged. No portion of the award was for time spent preparing *trustee's* counsel's first fee application.⁶ Therefore, it is not subject to the Guidelines cap.

Section 330(a)(4) of the Bankruptcy Code provides that a trustee or employed professional person may not be compensated for services that were not reasonably likely to benefit the debtor's estate or otherwise necessary to the administration of the case. “The absence of a monetary benefit to the estate is not determinative of whether compensation for . . . attorneys is awarded or denied.” *In re HCS Corp.*, 59 B.R. 307, 309 (Bankr. S.D. Cal. 1986). As one bankruptcy court explained:

⁶ Trustee's counsel separately requested and was awarded \$12,104 for services related to obtaining approval of their own first fee application, which they documented in Exhibit E to their second fee application. This award was for fees constituting 4.2% of the fees allowed in the first fee application, and therefore is under the Guidelines cap. See *id.*, Ex. E.

1 Trustees are an integral part of the successful operation of the bankruptcy laws. If this
2 Court required the trustee to pay for his or her own representation, given the relatively
3 modest compensation the Code provides for trustees, the practical effect would be that few
4 trustees would be willing to serve. This is especially true regarding non-attorney trustees.
The Ninth Circuit has expressly recognized the concern that absent provisions for adequate
compensation of bankruptcy professionals, highly qualified professionals would abandon
bankruptcy work in favor of more remunerative kinds of work.

5 *HCS*, 59 B.R. at 310 (citing *In re Nucorp Energy, Inc.*, 764 F.2d 655, 658 (9th Cir. 1985)). On the basis
6 of this reasoning, bankruptcy courts have determined that “[a] representative of the bankruptcy estate
7 in otherwise good standing is entitled to defend him or herself from allegations of malfeasance by a
8 creditor, and, unless malfeasance is established, the estate shall bear the reasonable costs of such
9 defense.” See *In re Yellow Cab, Co.*, 212 B.R. 154, 159 (Bankr. S.D. Cal. 1997) (explaining that this
10 is the rule established by *HCS*, and that the rule is “correct”). The same logic applies to defense of
11 claims of malfeasance made by the debtor.

12 The Bankruptcy Court made a specific finding that it was appropriate for trustee to hire counsel
13 to assist him with the challenges to his fee application, and that the amount sought to compensate
14 trustee’s counsel for these services was “reasonable” because “there was an objection” to trustee’s fee
15 application and “the trustee prevailed.” The amount was also “supported by the declarations.”
16 December 2010 Transcript 7:21–9:2 (Appellees’ Appendix 408–10). These findings are not clearly
17 erroneous. Given the facts of this case, and the *Yellow Cab/HCS* rule, it was not an abuse of discretion
18 for the Bankruptcy Court to award trustee’s counsel compensation from the estate for the reasonable
19 costs of successfully defending trustee’s application for a fee award from a challenge by debtor.
20

21 **B. Case administration**

22 Debtors argues that the hours trustee’s counsel spent on “case administration” were not
23 beneficial to the estate, did not aid in the administration of the estate, and that the fees awarded for that
24 work were not reasonable.

25 In their second fee application, trustee’s counsel requested fees for 66.30 hours of work spent:
26 (1) attempting to comply with the Bankruptcy Court’s order of conditional dismissal by negotiating with
27 debtor’s counsel regarding how the necessary conditions of dismissal could best be met, and (2)

1 responding to appeals, the motion for withdrawal of reference, and the motion for removal of trustee.⁷

2 Time spent attempting to settle the estate was reasonably likely to benefit the estate, and in fact
 3 would have benefitted the estate had debtor not made “a 180-degree change in [her] course of conduct.”
 4 *Id.* TR 4:8–4:9 (Appellees’ Appendix 405).

5 The Bankruptcy Court made a specific finding that it was appropriate for trustee to hire counsel
 6 to assist him “defending the appeals of orders entered by” the Bankruptcy Court, “responding to a
 7 motion to withdraw reference,” and “defending . . . the trustee,” and that the amount sought to
 8 compensate trustee’s counsel for these services was “reasonable.” The amount was also “supported by
 9 the declarations.” December 2010 Transcript 7:21–9:2 (Appellees’ Appendix 408–10). These findings
 10 are not clearly erroneous. Given the facts of this case, and the *Yellow Cab/HCS* rule, it was not an abuse
 11 of discretion for the Bankruptcy Court to award trustee’s counsel compensation from the estate for the
 12 reasonable costs of successfully defending orders entered granting trustee’s motions.⁸

13 C. **Litigation: debtor v. trustee**

14 Debtor argues that time spent by trustee’s counsel’s defending trustee in the civil suit debtor
 15 brought against him was not beneficial to the estate, and did not aid in the administration of the estate,
 16 and therefor that the Bankruptcy Court erred as a matter of law when it permitted trustee’s counsel to
 17 obtain compensation from the estate for the litigation costs associated with the civil case.

18 “A representative of the bankruptcy estate in otherwise good standing is entitled to defend him
 19 or herself from allegations of malfeasance by a creditor, and, unless malfeasance is established, the
 20 estate shall bear the reasonable costs of such defense.” *See In re Yellow Cab, Co.*, 212 B.R. 154, 159

21
 22
 23 ⁷ Debtor also argues that the award was premature, because it is not yet clear whether
 24 trustee will prevail on debtor’s appeals and motions. However, trustee has prevailed on the appeals and
 motions that are part of the “case administration” fee request, or they have been withdrawn by debtor.

25 ⁸ It appears from the invoice submitted by trustee’s counsel that some or all of the first 11
 26 entries in this category are for work done with regard to the Sloan appeals, for a total of between nine
 27 and 10.8 hours of work. *See* Bankr. Doc. 418 (Appellees’ Appendix Tab 10), Ex. B. Because it is of
 28 benefit to the estate successfully to defend orders from attack by non-parties, for the reasons discussed
 below in section D regarding debtor v. Sloan litigation, and based on the Bankruptcy Court’s findings
 of fact, it was not an abuse of discretion for the Bankruptcy Court to award trustee’s counsel money for
 this work.

1 (Bankr. S.D. Cal. 1997). This is no less true where, as here, the allegation of malfeasance was made by
2 debtor herself. Debtor's civil case was dismissed, and given the facts of this case, the Bankruptcy Court
3 had the discretion to grant trustee's counsel compensation from the estate for the litigation costs
4 associated with the civil case.

5

6 **D. Litigation: trustee v. Sloan**

7 Debtor argues that trustee's defamation case against Sloan "has nothing to do with her or her
8 estate," that the litigation was not beneficial to the estate and did not aid in the administration of the
9 estate, and therefor the Bankruptcy Court erred as a matter of law when it permitted trustee's counsel
10 to obtain compensation from the estate for the litigation costs associated with the defamation case. She
11 also argues that the \$15,236.50 of fees awarded to trustee's counsel for 54.9 hours of work are excessive
12 and unreasonable, since Sloan did not appear to defend himself, and trustee requested default judgment.⁹
13 And she challenges as particularly unreasonable fees awarded for approximately 10 hours spent
14 "review[ing] Google searches for content and URLs re David Bradlow" over three consecutive days
15 immediately preceding trustee's request for default judgment. *See* Bankr. Doc. 418 (Appellees'
16 Appendix Tab 10), Ex. D (entries for Sept. 21–23, 2010).

17 Trustee's counsel explain that the fees were incurred researching defamation law; conferring
18 with debtor's prior counsel, who believed that he could convince Sloan to remove his defamatory
19 postings; prosecuting the adversary proceeding; and contacting websites to determine what the sites
20 required in a court order before they would remove the posted material. In trustee's counsel's reply
21 brief in support of their second fee application, they explained that "Mr. Sloan continued to post
22 defamatory material on the internet throughout the litigation" and that "Mr. Sloan's continued postings
23 required Applicant to spend significant time searching the internet for new postings and reviewing each
24 posting to determine whether it fell within the limited scope of the litigation." Reply Br. (Bankr. Doc.
25 422) (Appellees' Appendix Tab 13), at 5. Attached to trustee's brief in support of his motion for default
26

27 ⁹ She argues that the award was premature, since trustee's application for judgment is still
28 pending. However, the Bankruptcy Court granted trustee's motion for default judgment in November
2010. *See Judgment* (Bankr. Adversary Proceeding 10-03040, Doc. 11).

1 judgment are exhibits listing each website where each defamatory statement was posted. *See* Decl. of
2 Jeffrey C. Wurms in Supp. of Req. for Entry of Default Judgment, Exs. A–F (Bankr. Adversary
3 Proceeding 10-03040, Doc. 10) (listing many dozens of websites where six documents containing the
4 defamatory statements were posted).

5 “A representative of the bankruptcy estate in otherwise good standing is entitled to defend him
6 or herself from allegations of malfeasance by a creditor, and, unless malfeasance is established, the
7 estate shall bear the reasonable costs of such defense.” *See In re Yellow Cab, Co.*, 212 B.R. 154, 159
8 (Bankr. S.D. Cal. 1997). Here, Sloan was not a creditor, nor a party to the bankruptcy case. However,
9 the Bankruptcy Court made sufficient findings of fact to bring Sloan within the ambit of the
10 *YellowCab/HCS* rule, and those findings were not clearly erroneous. *See* December 2010 Transcript
11 8:6–8:7 (Appellees’ Appendix 409) (finding that Sloan “at all relevant times had very close connections
12 with the debtor.”); *see also* Feb. 2010 Transcript 4:14–4:15, 5:25–6:1 (Appellees’ Appendix 78–79)
13 (finding Sloan to be “an officious . . . meddler, to say the least”); Order (Bankr. Doc. 302) (declaring
14 Sloan to be a vexatious litigant and imposed a filing injunction against him in the bankruptcy case).
15 Even if debtor is wholly disconnected from Sloan’s decisions to interfere in this case and defame trustee,
16 debtor herself admits that “[t]he trustee’s problem with Sam Sloan began when he initiated eviction
17 proceedings in the San Francisco County Superior Court,” Memo. in Oppo. (Bankr. Doc. 278), at 2, an
18 action that trustee performed as part of his official job at trustee of debtor’s estate. The policy reasons
19 articulated in *HCS* for the rule laid out in the case support a fee award under these circumstances as well.
20 *See HCS*, 59 B.R. at 310.

21 The Bankruptcy Court made a specific finding that it was appropriate for trustee to hire counsel
22 to assist him “obtaining judgment for libel perpetrated against the trustee in circumstances which
23 strongly indicate that the party committing the libel was – at all relevant times had very close
24 connections with the debtor, responding to an objection to a fee application.” December 2010
25 Transcript 7:24–8:7 (Appellees’ Appendix 408–09). The Bankruptcy Court also found that “the amount
26 sought the fee application” was “reasonable” and “supported by the time sheets,” and that “[t]he trustee
27 heeded the Court’s admonition to – to seek a determination, not a large damage award, to seek limited
28 scope of relief.” *Id.* TR 8:22–9:14 (Appellees’ Appendix 409–10). These findings are not clearly

1 erroneous, and the Bankruptcy Court did not abuse its discretion awarding fees for this work.
2

3 **E. Monthly operating reports**

4 Debtor objects to fees awarded to trustee's counsel for the preparation and filing of monthly
5 operating reports and other activities regarding those reports, arguing that they are not the type of task
6 for which a trustee may employ professionals. *See In re Jenkins*, 188 B.R. 416, 420 (9th Cir. BAP 1995)
7 ("A trustee may employ professionals only for those tasks that require special expertise beyond that
8 expected of an ordinary trustee.").

9 Trustee's counsel explains that they requested and were awarded fees for 5.1 hours spent
10 assisting trustee and the estate's accountant with their preparation and filing of monthly operating
11 reports, responding to inquiries regarding those reports, communicating with the U.S. Trustee's Office
12 about modifying reporting requirements, and preparing the pleadings necessary to obtain this Court's
13 approval of the modification.

14 The Bankruptcy Court found that it was "very much appropriate for the trustee to hire counsel
15 to assist" him with "keeping current with the operating reports." December 2010 Transcript 7:24–8:3
16 (Appellees' Appendix 408–09). It appears that trustee's counsel devoted approximately one hour to
17 reviewing four monthly operating reports, and that the remainder of the time was spent modifying the
18 reporting requirements for the case. *See* Bankr. Doc. 418 (Appellees' Appendix Tab 10), Ex E. On this
19 record, and given debtor's repeated challenges to work performed by trustee, the Court cannot say that
20 the Bankruptcy Court's finding was erroneous, or that the facts in this case do not satisfy the legal rule
21 articulated in *Jenkins*.

22
23 **II. Order granting the second fee application of trustee**

24 Debtor argues that the fees awarded to trustee are unreasonable and exceed the statutory limit
25 set forth in 11 U.S.C. § 326. In particular, debtor objects to trustee's claim for nearly 25 hours spent
26 completing his first fee application alone, as being in excess of the 5% allowed.

27 Trustee requested, and was awarded, fees for 12.6 hours of time spent preparing the first fee
28

1 application.¹⁰ In *In re Dimas, LLC*, 2009 WL 7809032 (9th Cir. BAP Feb. 25, 2009) (per curiam), the
 2 BAP held that the Guidelines generally are not mandatory. However, Guideline 6 contains unique
 3 mandatory language, and “in light of the mandatory language of this particular Guideline, if the
 4 bankruptcy court approves fee application preparation fees in excess of the five percent cap, it must state
 5 why.” *Id.* at * 7. Because “no explanation was provided” by the bankruptcy court, “it was an abuse of
 6 discretion to approve fees for preparation of fee applications in excess of the five percent Guideline.”
 7 *Id.* at * 7.¹¹ In this case, trustee admitted in his Bankruptcy Court filings that the 12.6 hour request
 8 amounted to 5.5% of the total fees requested by trustee in the first fee application. *See* 2d App. for
 9 Interim Compensation (Bankr. Doc. 419) (Appellees’ Appendix Tab 11), at 6. Although this is in excess
 10 of the cap provided for by Guideline 6, the Bankruptcy Court did not make any finding of fact that
 11 would support exceeding the five percent mandatory guideline. This was an abuse of discretion. In
 12 light of the mandatory five percent cap contained in Guideline 6, and the lack of an explanation by the
 13 bankruptcy court for allowing the cap to be exceeded, the Court REVERSES and ORDERS trustee to
 14 disgorge fees in the amount of \$225.¹²

15 The remainder of the award is reasonable, however, and does not exceed statutory limits.
 16 Section 326(a) of the Bankruptcy Code limits the compensation that may be awarded to a trustee for his
 17 services based on “moneys disbursed or turned over in the case by the trustee to parties in interest,
 18 excluding the debtor, but including holders of secured claims.” Debtor did not argue that trustee’s
 19

20 ¹⁰ The remaining 11.9 hours were spent litigating debtor’s challenges to the fee application.
 21 That time is not subject to the 5% cap containing in the Guidelines, and the award of compensation is
 22 supported by the Bankruptcy Court’s findings of fact regarding expenses incurred due to debtor’s
 23 conduct, which are not clearly erroneous.

24 ¹¹ Although the disposition is unpublished and therefore not precedential, the Federal Rules
 25 of Appellate Procedure permit the Court to cite the case for whatever persuasive value it may have. The
 26 BAP provided a lengthy explanation for why it determined that this particular Guideline is mandatory,
 27 the determination that it is mandatory still provides bankruptcy courts sufficient discretion to make
 28 reasonable fee awards, and the disposition is in accord with the scant precedent that exists for reviewing
 29 application of the Guidelines on appeal, *see In re Agyekum*, 225 B.R. 695, 700 (9th Cir. BAP 1998).
 30 The Court adopts the BAP’s legal conclusion for the reasons stated in the disposition.

31 ¹² Debtor’s argument is not waived. Although she did not cite Guideline 6 to the
 32 Bankruptcy Court, she did make a specific objection to the reasonableness of trustee’s request for fees
 33 for preparing his first fee application. Guideline 6 and the rule adopted from *Dimas* both concern the
 34 reasonableness of the fee request, and debtor’s argument was properly before the Bankruptcy Court.

1 award exceeded the limits set forth in Section 326(a) before the bankruptcy court, and therefore the
2 bankruptcy court did not make any specific findings of fact with regard to Section 326(a). However,
3 the bankruptcy court did find that the award was reasonable and supported by trustee's declarations.
4 See December 2010 Transcript 7:24–9:24 (Appellees' Appendix 408–10). In one declaration, trustee
5 explained that total disbursements in the case totaled \$5,651,315; that the fees permitted by Section
6 326(a) were therefore \$192,789.45; and that the total fees trustee requested in the case equaled
7 \$128,565.00. Decl. of David Bradlow in Supp. of 2d App. for Interim Compensation (Bankr. Doc. 419)
8 (Appellees' Appendix Tab 11), Ex. B. Assuming debtor's statutory argument is not waived, it fails, as
9 the Bankruptcy Court did not abuse its discretion or misapply facts to law.

III Waived arguments

12 Debtor makes a variety of other arguments that she failed to raise at all before the Bankruptcy
13 Court and are waived.

14 Debtor argues that the fee awards will come directly from money that is part of a \$150,000
15 homestead exemption, only half of which has been released to debtor. Because debtor failed to raise
16 this argument in the Bankruptcy Court, it is waived on appeal.¹³ (This determination of waiver is order-
17 specific and is without prejudice to the Bankruptcy Court ruling on a trustee request to surcharge the
18 homestead or a future debtor objection based on the homestead exemption.)

Debtor argues that trustee's counsel have interests adverse to the estate. Debtor failed to raise

¹³ Debtor previously requested that the Bankruptcy Court release the \$150,000, trustee objected, and the Bankruptcy Court released \$75,000. See Bankr. Docs. 255 at 2, 265 at 7–8, 299 at 2. Trustee’s objections were based on previous findings by the Bankruptcy Court that debtor’s conduct had interfered with trustee’s administration of the estate. See Bankr. Doc. 265 at 7–8. Trustee asked the Bankruptcy Court to “surcharge the Debtor’s homestead for the increased costs and fees in administering the estate,” citing *In re Onubah*, 315 B.R. 549 (9th Cir. BAP 2007), and indicated that trustee was seeking fees that might preclude awarding debtor the exemption given the limited resources remaining in the estate. *Id.* Although the Bankruptcy Court did not rule on the surcharge request, see Bankr. Doc. 299 at 2–3 ¶¶ 7–8, the specific issue was flagged for debtor, and she failed to raise it before the Bankruptcy Court. Moreover, trustee is correct that *Onubah* could support a surcharge. See 315 B.R. at 555 (holding that surcharge is available where a debtor attempts to keep nonexempt property out of the hands of the trustee, even if the debtor is not successful, as long as the debtor’s misconduct nonetheless deprives the estate and her creditors of “access to property in excess of that which” the debtor could properly exempt); see also *Latman v. Burdette*, 366 F.3d 774, 785–86 (9th Cir. 2004).

1 this argument in the Bankruptcy Court, and it is waived on appeal.¹⁴

2 Debtor argues that trustee has breached his fiduciary duty to the estate by failing to expeditiously
3 administer the estate, including by opposing his own dismissal as trustee, and preventing closure and
4 final distribution. Debtor failed to raise this argument in the Bankruptcy Court, and it is waived on
5 appeal.¹⁵

6 Debtor argues that the first fee awards granted to trustee and trustee's counsel's should be
7 disgorged. Debtor's appeal of the first fee awards was dismissed for failure to prosecute, *see Order*
8 (Case No. 10-1431, Doc. 14), and she did not argue in the Bankruptcy Court proceedings opposing entry
9 of the orders being appeals in this case that the first fee award should be disgorged. Her arguments are
10 waived.

11 Debtor appears to challenge the fees awarded to trustee's accountant. *See Appellant's Opening*
12 Br. at 4 ("Is the Trustee's Accountant entitled to compensation?"); Appellant's Reply Br. at 3
13 ("[A]ccountants could and should have at least explored avenues to reduce her tax bill"). To the extent
14 that she does so, her arguments are waived, as she failed to challenge the accountant's application in the
15 bankruptcy court, and she did not appeal the order granting the application. *See December 2010*
16 Transcript 2:13–24 (Appellees' Appendix at 403)¹⁶; Order (Bankr. Doc. 424) (granting accountant fees);
17

18 ¹⁴ Even if it were not waived, the record would not support debtor's argument. Debtor cites
19 *In re Pruitt*, 319 B.R. 636 (Bankr. S.D. Cal. 2004), which discusses the "tension between the Trustee's
20 role as the representative of creditors on the one hand and, on the other hand, his own self-interest in
21 maximizing his compensation." *Id.* at 638. This tension always exists and, when a trustee hires an
22 attorney pursuant to Section 327 of the Bankruptcy Code to assist with the administration of an estate,
23 the tension will exist with regard to the trustee's counsel as well. Significantly more is required before
a court could find that the interests of a trustee or trustee's counsel are materially adverse to an estate.
Cf. In re AFI Holding, Inc., 530 F.3d 832 (9th Cir. 2008) (explaining that the inquiry into whether a
party holds an interest that is materially adverse to bankruptcy estate, so as not to qualify as disinterested
under Section 324 of the Bankruptcy Code, necessarily requires an objective and fact-driven inquiry
based on the "full panoply of events and elements").

24 ¹⁵ Even if it were not waived, the record would not support debtor's argument. In denying
25 debtor's most recent arguments to close the estate and dismiss trustee, the Bankruptcy Court made
specific findings that it is debtor's conduct that has prevented the expeditious administration of the
estate. *See Memo. Re: Debtor's Mot. to Dismiss Trustee* (Bankr. Doc. 414), at 2; December 2010
Transcript 4:11-5:3 (Appellees' Appendix 405–06).

27 ¹⁶
28 THE COURT: Okay. I have fee applications here in the Van Upp case from the trustee's
counsel, the trustee, and the trustee's accountant. There are objections to the applications

1 Notice of Appeal (Bankr. Doc. 427) (Appellees' Appendix Tab 17).

2 Finally, debtor raises arguments in her reply brief that were not raised in her opening brief and
3 are waived.¹⁷

5 **CONCLUSION**

6 In accordance with the discussion set forth above, the order granting fees to trustee's counsel
7 is AFFIRMED, the order granting fees to trustee is AFFIRMED IN PART and REVERSED IN PART,
8 and trustee is ORDERED to disgorge fees in the amount of \$225.

10 **IT IS SO ORDERED.**

11 Dated: August 22, 2011

Susan Illston
12 SUSAN ILLSTON
13 United States District Judge

16 by trustee and trustee's counsel. There's no objection that I've seen to trustee's
17 accountant.

18 [DEBTOR'S COUNSEL]: I think we – didn't we combine them, Your Honor, combined
19 objections to trustee's and counsel?

20 THE COURT: Yeah, but not the accountant.

21 [DEBTOR'S COUNSEL]: Oh, yes, okay.

22 THE COURT: Am I missing something?

23 [DEBTOR'S COUNSEL]: Well, I thought we did, but obviously we didn't, so.

24 ¹⁷ Debtor argues that the Bankruptcy Court improperly stated that she must give up her right
25 to object or appeal in order to seek dismissal. Even if this argument were not waived, it would fail, as
26 the Bankruptcy Court has specifically stated on the record that "debtor can" object and appeal; the
27 problem is that "debtor can't – has no right to have the trustee not defend orders that have been entered
28 by the Court. The trustee is really – the debtor is really spending her own money" when she "unduly
contest[s] things, is contesting matter, after matter, after matter." December 2010 Hearing TR 4:11-5:3
(Appellees' Appendix 405–06). She also argues that "General matters cost the debtor \$3,547.50 and
included taxes which were too high and which no one sought to reduce." Appellant's Reply Br. at 3.
It is not clear what debtor's argument is, though it is clear that she did not raise this objection in her
opening brief, as she did not discuss "General matters" or taxes.